



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 337 OF 2017

STEPHEN MUNENE NJAGI.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY

PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The Respondents/Applicants seek through the Notice of Motion Application dated 14th December 2017 for orders seeking to stay the decision of the honourable court pending the hearing and determination of the pending appeal now at the Court of Appeal preferred against the decision of Ongaya J. on 8th December 2017 in the matter. The Respondents urge the court to stay the parts of the decision ordering the payment of the sums stated to be due to the Claimant. The Claimant/Respondent is opposed to the grant of stay of execution asserting that the motion is devoid of merit and is fit only for dismissal.

2. In submissions filed opposing the grant of orders of stay, the Claimant submits that the factors to consider in such a matter are old hat. The Claimant relies on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where Gikonyo J. held that in

...in the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

The Claimant/Respondent submits that he who seeks equity must do so with clean hands. The Claimant asserts that the Respondent has been in breach of court orders and is wholly undeserving of the discretionary powers of the court as the Respondents have disobeyed the orders of the court and were even subject of a contempt of court application.

3. The Respondents in their submissions assert that they have a right to seek redress in the Court of Appeal and cite a series of cases for this proposition. The Respondents cite the case of **Ernie Campell & Company v Githunguri Dairy Plant Co. Ltd and Another [2009] eKLR** per Kimaru J. The Respondent argue that upon weighing the competing interests on the competing interests of the parties in their desire to preserve the status quo and the right which has accrued on the judgment, the court has to balance between the two and if substantial loss would ensue if there is no stay, then the court should grant it.

4. In cases where stay of execution pending appeal is sought, the party seeking the stay has to satisfy the court of certain criteria. The power a court exercises in granting or denying stay is discretionary. A stay may be granted if the court finds that there is basis for the grant. The Court of Appeal in **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** per Gicheru JA, Chesoni & Cockar Ag. JA (as they all then were) held:-

The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

5. In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo**

v Straman East Africa Ltd [2013] eKLR as follows:-

In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.

6. Further, in the case cited by the Respondent being that of **Butt v Rent Restriction Tribunal [1982] KLR 417**, Madan JA (as he then was) held as follows:-

It is in the discretion of the court whether to grant or refuse stay but what has to be judged in each case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory per Brett, LJ in Wilson v Church (No. 2) 12 Ch D (1879) 454 at p 459. (underline mine).

7. The conditions for stay are that firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. Additionally, as Madan JA (as he then was) stated, the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory. In the matter before me, the Respondent/Applicant has not demonstrated that it has an arguable appeal given that there is no draft memorandum of appeal annexed to the application. Only a notice of appeal is annexed. That disposes of the first limb. On the second limb, the issue of substantial loss that would ensue from a refusal to grant stay, there is no indication of the loss to the Respondent should a stay be declined. On the third limb, the applicant must furnish security. In this motion no security was furnished. As regards the holding by Justice Madan, the court is to exercise its best discretion so as to prevent the appeal from being rendered nugatory. The Respondent has satisfied a major part of the judgment and the only aspect for the Court of Appeal may be academic given that the period the Claimant was to serve is now past. The upshot of the foregoing is that I do not find that the application for stay is merited and the same is hereby denied. The Respondent is to pay costs of the application to the Claimant.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of November 2018

Nzioki wa Makau

JUDGE